

No. SC86269

IN THE SUPREME COURT OF MISSOURI

KAREN F. TRIMBLE,

Respondent/Cross-Appellant,

v.

TIMMI ANN PRACNA,

Appellant/Cross-Respondent.

ON TRANSFER AFTER OPINION OF THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

APPELLANT'S SUBSTITUTE RESPONSE/REPLY BRIEF

CHARLES B. COWHERD, #27087

HUSCH & EPPENBERGER, LLC
1949 E. Sunshine St., Suite 2-300
Springfield, Missouri 65804
PHONE: (417) 862-6726
FAX: (417) 862-6948

ATTORNEYS FOR APPELLANT
TIMMI ANN PRACNA

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u>	2
<u>JURISDICTIONAL STATEMENT</u>	4
<u>STATEMENT OF FACTS</u>	4
<u>RESPONSE TO CROSS APPEAL</u> POINTS RELIED UPON.....	5
ARGUMENT - CROSS APPEAL POINT I.....	9
ARGUMENT - CROSS APPEAL POINT II.....	15
ARGUMENT - CROSS APPEAL POINT III.....	18
ARGUMENT - CROSS APPEAL POINT IV.....	20
REPLY POINTS RELIED UPON.....	23
REPLY ARGUMENT - POINT I.....	28
REPLY ARGUMENT - POINT II.....	30
REPLY ARGUMENT - POINT III.....	33
REPLY ARGUMENT - POINT IV.....	37
REPLY ARGUMENT - POINT V.....	39
<u>CONCLUSION</u>	44
<u>CERTIFICATE OF COMPLIANCE/CERTIFICATE OF SERVICE</u>	45

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Anglin Engineering Co. v. J.E. Barry Co., Inc.</i>	
912 S.W.2d 633 (Mo. App. E.D. 1995).....	27, 42
<i>Buchweiser v. Estate of Laberer,</i>	
695 S.W.2d 125 (Mo.banc 1985).....	12
<i>Board of Education of the City of</i>	
<i>St. Louis v. Elam</i> , 70 S.W. 3 rd 448 (Mo.App. E.D. 2000).....	25, 33
<i>Brosnahan v. Brosnahan</i> , 516 S.W.2d 812 (Mo.App. 1974)	13
<i>Cohen v. Cohen</i> , 73 S.W.3d 39 (Mo.App. 2002)	7, 18
<i>DeMean v. Ledl</i> , 796 S.W.2d 415 (Mo.App. S.D. 1990)	23, 29
<i>Fritts v. Cloud Oak Flooring Company</i> , 478 S.W.2d 8	
(Mo.App. 1972).....	23, 29
<i>Graue v. Missouri Property Insurance</i>	
<i>Placement Facility</i> , 847 S.W.2d 779 (Mo.banc 1993).....	8, 21
<i>Jaycox v. Brune</i> , 434 S.W.2d 539 (Mo. 1968)	6, 16
<i>Johnson v. Bush</i> , 418 S.W.2d 601, 604 (Mo. App. 1967).....	41
<i>Keefhaver v. Kimbrell</i> , 58 S.W. 3d 54 (Mo.App. W.D. 2001)	26, 38
<i>Kincaid Enterprises, Inc. v. Porter,</i>	
812 S.W.2d 892 (Mo. App. W.D. 1991).....	27, 40
<i>Nooney Krombach Co. v Blue Cross &Blue Shield of Missouri,</i>	
929 S.W. 2d 888, 895 (Mo. App. E. D. 1996).....	25, 35

<i>Roberts v. McNary</i> , 636 S.W.2d 332 (Mo. 1982) (overruled on other grounds by <i>Keller v. Marion County Ambulance Dist.</i> , 820 S.W. 2d 301 (Mo. 1991).....	7, 19
<i>Rodefeld v. St. Louis Public Service Company</i> , 275 S.W.2d 256 (Mo. 1955).....	13
<i>Schroeder v. Prince Charles, Inc.</i> , 427 S.W.2d 414 (Mo. 1968)	5, 12
<i>Shelby v. Slepekis</i> , 687 S.W. 2d 231, 236 (Mo. App. 1985).....	5, 14
<i>Staab v. Thoreson</i> , 579 S.W.2d 414 (Mo.App. S.D. 1979).....	12
<i>Stotler v. Bollinger</i> , 501 S.W.2d 558, 560 (Mo. App. 1973).....	27, 41
<i>Tile Craft Products Co. v. Colonial Properties, Inc.</i> , 449 S.W.2d 653 (Mo. 1970).....	12
<i>Trimble v. Pracna</i> , 51 S.W.3d 481 (Mo.App. S.D. 2001)	5, 9, <i>passim</i>
<i>Welch v. Continental Placement, Inc.</i> ,.....	5, 14
627 S.W.2d 319, 321 (Mo. App. 1982)	

Other Authorities

Civil Rule 55.01	6, 16
Civil Rule 55.08.....	24, 31
Civil Rule 70.03.....	27, 41
Section 516.120 RSMo. 2000	24, 31

JURISDICTIONAL STATEMENT

Defendant Pracna hereby adopts the jurisdictional statement set forth in her substitute opening brief filed herein.

STATEMENT OF FACTS

Defendant Pracna hereby adopts the Statement of Facts set forth in her substitute opening brief herein.

RESPONSE TO CROSS APPEAL

POINT I.

THE TRIAL COURT DID NOT ERR IN REDUCING THE JUDGMENT FOR BREACH OF CONTRACT BY THE AMOUNT OF MS. PRACNA'S \$58,500.00 PAYMENT BECAUSE THE TRIAL COURT HAD JURISDICTION TO CREDIT THE PAYMENT OR TO ALLOW MS. PRACNA TO RECOUP THE PAYMENT IN THAT MS. PRACNA PLEADED PAYMENT AS AN AFFIRMATIVE DEFENSE, THE PARTIES AGREED TO REMOVE THE PAYMENT ISSUE FROM THE JURY, AND MS. TRIMBLE AND HER ATTORNEYS REPEATEDLY ADMITTED RECEIPT OF THE PAYMENT.

Trimble v. Pracna, 51 S.W.3d 481 (Mo.App. S.D. 2001)

Schroeder v. Prince Charles, Inc., 427 S.W.2d 414, 419 (Mo. 1968)

Welch v. Continental Placement, Inc., 627 S.W.2d 319, 321 (Mo. App. 1982)

Shelby v. Slepekis, 687 S.W. 2d 231, 236 (Mo. App. 1985)

RESPONSE TO CROSS APPEAL

POINT II.

THE TRIAL COURT DID NOT ERR IN GIVING MS. PRACNA CREDIT FOR HER \$58,500.00 PAYMENT BECAUSE THAT CREDIT WAS NOT BARRED BY THE STATUTE OF LIMITATIONS, RES JUDICATA OR THE PRIOR DECISION OF THE COURT OF APPEALS IN THAT SHE FIRST PLEADED THE PAYMENT AS A DEFENSE IN THIS CASE LESS THAN TWO YEARS AFTER THE PAYMENT WAS MADE, AND THE CREDIT DID NOT DEPEND UPON HER COUNTERCLAIM BUT WAS A DEFENSE TO PREVENT DOUBLE RECOVERY BY THE PLAINTIFF.

Civil Rule 55.01

Jaycox v. Brune, 434 S.W.2d 539, 547 (Mo. 1968)

RESPONSE TO CROSS APPEAL

POINT III.

THE TRIAL COURT CORRECTLY ASSESSED TRIMBLE'S COSTS AND EXPENSES, BECAUSE THE TRIAL COURT'S AWARD OF COSTS AND EXPENSES IS PRESUMPTIVELY CORRECT AND TRIMBLE HAS PRODUCED NO EVIDENCE OF ERROR, IN THAT THE RECORD REFLECTS THAT THE TRIAL COURT AWARDED TRIMBLE BOTH HER REQUESTED COSTS AND EXPENSES.

Cohen v. Cohen, 73 S.W.3d 39 (Mo.App. 2002)

Roberts v. McNary, 636 S.W.2d 332, 338 (Mo. 1982) (overruled on other grounds by *Keller v. Marion County Ambulance Dist.*, 820 S.W. 2d 301 (Mo. 1991))

RESPONSE TO CROSS APPEAL

POINT IV.

THE TRIAL COURT DID NOT ERR IN AWARDING ATTORNEY'S FEES TO THE PLAINTIFF AT THE RATE OF 33 1/2% ON THE AMOUNT OF THE JURY AWARD AND NOT ON AN HOURLY BASIS BECAUSE THE BOND CONTRACT DID NOT PROVIDE FOR A PERCENTAGE OF ATTORNEY'S FEE ONLY IN THE EVENT A JUDGMENT WAS ENTERED IN THAT THE CONTRACT STATES THAT A PERCENTAGE FEE WOULD BE EARNED "WHETHER OR NOT SUCH ACTION PROCEEDS TO JUDGMENT."

Graue v. Missouri Property Insurance Placement Facility, 847 S.W.2d 779
(Mo.banc 1993)

RESPONSE TO CROSS APPEAL

POINT I.

THE TRIAL COURT DID NOT ERR IN REDUCING THE JUDGMENT FOR BREACH OF CONTRACT BY THE AMOUNT OF MS. PRACNA'S \$58,500.00 PAYMENT BECAUSE THE TRIAL COURT HAD JURISDICTION TO CREDIT THE PAYMENT OR TO ALLOW MS. PRACNA TO RECOUP THE PAYMENT IN THAT MS. PRACNA PLEADED PAYMENT AS AN AFFIRMATIVE DEFENSE, THE PARTIES AGREED TO REMOVE THE PAYMENT ISSUE FROM THE JURY, AND MS. TRIMBLE AND HER ATTORNEYS REPEATEDLY ADMITTED RECEIPT OF THE PAYMENT.

Incredibly, the plaintiff claims that the trial court erred in granting Ms. Pracna credit for the \$58,500.00 payment she made to the plaintiff. Ms. Trimble does not deny receipt of the payment, but instead argues that she should receive a windfall irrespective of the payment because of the ruling of the court of appeals in the first appeal ("Trimble I").¹ In making her claim, however, plaintiff ignores the pleadings which were before that court at the time of decision in Trimble I.

At the time of the trial which led to Trimble I, this case was pending on plaintiff's First Amended Petition. Count 1 of plaintiff's First Amended Petition sought recovery for breach of the bail bonds contract. In plaintiff's First Amended

¹ *Trimble v. Pracna*, 51 S.W.3d 481 (Mo.App. S.D. 2001).

Petition, she alleged that she incurred certain damages and then acknowledged specifically that she had received payment from Ms. Pracna in the amount of \$58,500.00 and that the payment should be credited against her claim for damages. (*See* S.L.F. 547, Ex. 127A).² In defendant Pracna's answer to the First Amended Petition, she asserted payment as an affirmative defense (S.L.F. 585). Plaintiff's First Amended Petition was the operative pleading upon which the court of appeals directed a retrial of the breach of contract claim on the issue of damages only. Following the entry of the court's decision in Trimble I, plaintiff sought and obtained permission from the trial court to file her Second Amended Petition (L.F. 017, 025). With respect to plaintiff's claim for breach of contract, the Second Amended Petition did not restate her allegation that defendant Pracna was entitled to a credit of \$58,500.00. Once again defendant Pracna alleged payment of the \$58,500.00 as an affirmative defense (L.F. 066).

Because it would have been difficult to determine whether the \$58,500.00 credit was given by the jury if the jury was allowed to apply the credit as part of its determination of damages, it was agreed by counsel for the parties at the time of the second trial that the trial court would decide whether to apply the credit after the jury verdict had been rendered. That agreement was reflected in the final

² All references to the record on appeal shall appear as follows: Legal File (L.F.__), Exhibit(s) (Ex(s).__), Transcript (T.R.__), Supplemental Legal File (S.L.F.__) and Appellant's Appendix (AA-__).

judgment (L.F. 323). During plaintiff's testimony she admitted receipt of the \$58,500.00 payment (T.R. 553). During the closing argument of plaintiff's counsel, he admitted that plaintiff had received the \$58,500.00 and told the jury that the credit for that amount would be handled by the trial court:

“We don't deny the \$58,000 was paid, but as how it's applied is for the judge to decide.” (T.R. 1589).

Plaintiff's claim that Pracna lost her right to a credit for the payment as a result of the ruling against defendant Pracna on her counterclaim is simply wrong. Defendant Pracna's counterclaim clearly sought to recover a judgment for any portion of the \$58,500.00 which represented an overpayment to the plaintiff. The jury might have rejected that claim for a number of reasons, but not because the jury did not believe that the money was paid. At the time of the second trial, the trial judge, with the agreement of counsel, withdrew the issue of the \$58,500.00 payment from consideration by the jury because the application of the credit for that payment was simply a ministerial function (L.F. 308). Plaintiff is entitled to recovery for damages once, but not twice. The payment was in fact part and parcel to the damages element of plaintiff's case and the action of the trial court simply recognized it as a credit Ms. Pracna was entitled to receive as a matter of law, as had been admitted by all parties.

Plaintiff is mistaken in her assertion that a payment for which a defendant seeks credit must necessarily be asserted as a counterclaim or be lost.

Although the trial court described the \$58,500.00 payment as a “set off”, in its judgment, it is apparent that the payment was not in fact a set off. The term “set off” is defined in the case *Buchweiser v. Estate of Laberer*, 695 S.W.2d 125, 129 (Mo.banc 1985) as follows:

“Set off is generally founded on a liquidated debt and used to discharge or reduce plaintiff’s claim by an opposite claim arising from a transaction extrinsic to the plaintiff’s cause of action.”

Obviously, defendant Pracna’s payment did not give rise to a claim extrinsic to the plaintiff’s cause of action and, therefore, was not a “set off” in the technical sense. Instead, the credit to which defendant Pracna was entitled is more properly characterized as a “recoupment.” *Schroeder v. Prince Charles, Inc.*, 427 S.W.2d 414, 419 (Mo. 1968) described a recoupment as a defensive matter arising out of the transaction giving rise to the plaintiff’s claim:

“Recoupment is a purely defensive matter growing out of the transaction constituting plaintiff’s cause of action, and is available only to reduce or satisfy plaintiff’s claim and permits no affirmative judgment.”

Also see Tile Craft Products Co. v. Colonial Properties, Inc., 449 S.W.2d 653, 656 (Mo. 1970). In fact, recoupment is available either as a purely defensive measure or as a counterclaim. *See Staab v. Thoreson*, 579 S.W.2d 414, 419 (Mo.App. S.D. 1979).

No one can argue that plaintiff was entitled to a double recovery up to the amount of the \$58,500.00 paid by defendant Pracna. The law in this state finds the concept of double recovery to be repugnant. *Rodefald v. St. Louis Public Service Company*, 275 S.W.2d 256, 261 (Mo. 1955). Missouri law also gives authority to a trial judge as part of the general powers granted to courts to control their own judgments to partially satisfy a judgment where it is apparent that partial satisfaction has been made. *See Brosnahan v. Brosnahan*, 516 S.W.2d 812, 814 (Mo.App. 1974).

In the appeal before this Court plaintiff has raised a new argument. That new argument is illustrative of the irresponsible application of the law that plaintiff advocates. Her argument is that the \$58,500.00 payment, which defendant Pracna paid to plaintiff and which plaintiff acknowledges receiving, should not be credited to defendant Pracna because of the mandate issued after the first appeal. Plaintiff ignores the fact that filing of her Second Amended Petition was not contemplated by the court of appeals when its mandate was issued in the first appeal. How could it? Plaintiff is initially entitled to use the mandate as a shield, she cannot also use it as a sword.

The first trial was based upon plaintiff's First Amended Petition (S.L.F. 547, Ex. 127A). Paragraph six of plaintiff's First Amended Petition specifically gave Pracna credit for the \$58,500.00 she paid (S.L.F. 548-549). Following the first appeal and the mandate from the court of appeals, plaintiff elected to file a Second Amended Petition (L.F. 025). In it, plaintiff omitted any reference to the

credit for \$58,500.00 paid by defendant Pracna. Astonishingly, plaintiff now claims that as a result of the filing of her Second Amended Petition defendant Pracna has lost her credit for the \$58,500.00 she paid. Nothing in the mandate of the court of appeals gave plaintiff that windfall.

The effect of filing the Second Amended Petition is very clear. The filing of an amended petition constitutes an abandonment of any previous petition filed and an abandoned petition can not sustain a judgment which had been entered upon it. *Welch v. Continental Placement, Inc.*, 627 S.W.2d 319, 321 (Mo. App. 1982) (when amended pleading is filed the former pleading is abandoned and becomes a mere “scrap of paper”); *Shelby v. Slepekis*, 687 S.W. 2d 231, 236 (Mo. App. 1985) (when petition upon which liability is determined is abandoned before judgment becomes final issue of liability is reopened). Thus the effect of the Second Amended Petition is clear—it reopened all issues in the case.

Nothing in the decision of the lower court in Trimble I required the trial court to turn a blind eye to justice. In spite of plaintiff’s attempt to misconstrue the court’s decision in Trimble I, there was in fact no impediment to giving defendant Pracna credit for the \$58,500.00 she paid to the plaintiff prior to the filing of suit. Any denial of that credit would do nothing but produce an undeserved windfall in favor of the Plaintiff and create a substantial injustice.

RESPONSE TO CROSS APPEAL

POINT II.

THE TRIAL COURT DID NOT ERR IN GIVING MS. PRACNA CREDIT FOR HER \$58,500.00 PAYMENT BECAUSE THAT CREDIT WAS NOT BARRED BY THE STATUTE OF LIMITATIONS, RES JUDICATA OR THE PRIOR DECISION OF THE COURT OF APPEALS IN THAT SHE FIRST PLEADED THE PAYMENT AS A DEFENSE IN THIS CASE LESS THAN TWO YEARS AFTER THE PAYMENT WAS MADE, AND THE CREDIT DID NOT DEPEND UPON HER COUNTERCLAIM BUT WAS A DEFENSE TO PREVENT DOUBLE RECOVERY BY THE PLAINTIFF.

For the first time, plaintiff has asserted that trial court could not grant Ms. Pracna credit for the \$58,500.00 she paid before suit was filed in this case on the grounds that it was barred by the statute of limitations, res judicata and the decision of the court of appeals in Trimble I.

Defendant Pracna paid the \$58,000.00 to plaintiff in September 1995 (Ex. 553). Plaintiff filed her petition in this case on October 24, 1996, and defendant Pracna filed her answer to the original petition on January 14, 1997 (S.L.F. 513 and 517). In Ms. Pracna's original answer, she asserted a defense that payment had been made (S.L.F. 518). She consistently reasserted that defense in the answer she filed to the First Amended Petition and again to the Second Amended Petition (S.L.F. 587 and L.F. 064). Moreover, in plaintiff's claim for breach of

contract in her original petition and her First Amended Petition, plaintiff acknowledged and credited Ms. Pracna for the payment of \$58,500.00 (S.L.F. 513 and 547, Exs. 127 and 127A). Ms. Trimble admitted receipt of the payment in her Reply to Defendant Pracna's Counterclaim (S.L.F. 532). It was only after the decision in Trimble I that plaintiff submitted her Second Amended Petition and omitted any reference to the \$58,500.00 payment (L.F. 025).

Plaintiff did not file any reply to the answer submitted by defendant in response to the Second Amended Petition (*See* L.F. 017, *et seq.*). Plaintiff was required to plead res judicata, collateral estoppel and the statute of limitations as an affirmative avoidance to Ms. Pracna's affirmative defense of payment if, in fact, a basis for the statute of limitations applied or defendant Pracna's affirmative defense was barred by res judicata or by collateral estoppel. *See* Civil Rule 55.01. Plaintiff never asserted any such affirmative avoidance to defendant Pracna's affirmative defense of payment, and therefore she waived any bar arising under any of those theories. *See Jaycox v. Brune*, 434 S.W.2d 539, 547 (Mo. 1968). Of course, any affirmative avoidance based on the statute of limitations was futile in any event in view of the fact that defendant Pracna filed her answer asserting the defense of payment much less than five years after the payment was made.

As explained in defendant Pracna's response to point 1 of plaintiff's Cross Appeal, the credit for the payment of \$58,500.00 paid by Ms. Pracna to the plaintiff was entirely appropriate as a recoupment or partial satisfaction of the verdict against Ms. Pracna. It is outrageous to suggest that a credit which plaintiff

herself acknowledged was properly due (at least until after the decision in Trimble I) should not have been given. By granting the credit, the trial court did nothing more than to grant plaintiff the full recovery which she claimed she was entitled to receive.

RESPONSE TO CROSS APPEAL

POINT III.

THE TRIAL COURT CORRECTLY ASSESSED TRIMBLE'S COSTS AND EXPENSES, BECAUSE THE TRIAL COURT'S AWARD OF COSTS AND EXPENSES IS PRESUMPTIVELY CORRECT AND TRIMBLE HAS PRODUCED NO EVIDENCE OF ERROR, IN THAT THE RECORD REFLECTS THAT THE TRIAL COURT AWARDED TRIMBLE BOTH HER REQUESTED COSTS AND EXPENSES.

The trial court's final judgment awarded Trimble expenses of \$12,324.67 and costs of \$5,804.55 (L.F. 422). Trimble now claims that the trial court improperly failed to award her the cost of the first appeal transcript as a cost or expense. Trimble raised this issue in her motion to reopen and amend the judgment, and the trial court declined to grant relief (L.F. 024, 328).

The fundamental problem is that Trimble has no evidence that the transcript cost was not awarded to her as a fee or as an expense. In her motion to reopen or amend, she specifically requested that the transcript cost be assessed against Heartfelt and Pracna as a cost or expense. The trial court awarded over \$18,000 in costs and expenses, without delineating what amounts were awarded for what items. In the absence of evidence to the contrary, the trial court's award of costs and expenses is presumed correct. In the context of attorney's fees, it has been stated: "The trial court's decision as to a request for attorney's fees is presumptively correct." *Cohen v. Cohen*, 73 S.W.3d 39, 56 (Mo.App. 2002).

Further, “[t]he setting of attorney’s fees is within the sound discretion of the trial court and should not be reversed unless the award is arbitrarily arrived at or is so unreasonable as to indicate indifference and lack of proper judicial consideration Thus, the burden was on appellants to affirmatively establish that the compensation allowed was a clear or manifest abuse of sound judicial discretion.” *Roberts v. McNary*, 636 S.W.2d 332, 338 (Mo. 1982) (overruled on other grounds by *Keller v. Marion County Ambulance Dist.*, 820 S.W. 2d 301 (Mo. 1991)). The same rule should be applied to costs and awarded expenses. The costs and expenses awarded are presumptively correct, and it is Trimble’s burden to show that the costs and expenses awarded amounted to a clear abuse of judicial discretion. Trimble has not met her burden. There is no reason to believe that the trial court did not award Trimble the transcript cost as a cost or as an expense.

The trial court had the opportunity to evaluate Trimble’s argument relating to the transcript cost and when it considered plaintiff’s Motion to Reopen and Amend the Judgment, it did not grant relief. To permit Trimble to recover her transcript cost excuses her from meeting her burden of proof and subjects Pracna to the risk of double damages where, on these facts, there is every reason to believe the cost or expense requested has already been awarded.

RESPONSE TO CROSS APPEAL

POINT IV.

THE TRIAL COURT DID NOT ERR IN AWARDING ATTORNEY'S FEES TO THE PLAINTIFF AT THE RATE OF 33 1/2% THE AMOUNT OF THE JURY AWARD AND NOT ON AN HOURLY BASIS BECAUSE THE BOND CONTRACT DID NOT PROVIDE FOR A PERCENTAGE OF ATTORNEY'S FEE ONLY IN THE EVENT A JUDGMENT WAS ENTERED IN THAT THE CONTRACT STATES THAT A PERCENTAGE FEE WOULD BE EARNED "WHETHER OR NOT SUCH ACTION PROCEEDS TO JUDGMENT."

Plaintiff's argument in Point 4 of the Cross Appeal very clearly establishes the issue raised by this defendant in point VI of her Appeal. The contract was very poorly written with respect to attorney's fees and is replete with vague and ambiguous terms.

Plaintiff seems to argue that under the terms of the bond contract, Plaintiff can recover all of her attorney's fees at an hourly rate on her suit for enforcement of the bond contract and that she is then entitled to a percentage fee just for the work of her attorneys in collecting the judgment. That interpretation would permit the recovery of attorney's fees upon attorney's fees. No doubt such a reading of the attorney fee clause would thrill many banks and their counsel where suit is filed to collect a promissory note which calls for a percentage attorney's fee after the note is referred to an attorney for collection.

Since the language in the contract respecting attorney's fees is so deficient, the court should apply the general rule that a contract prepared by a party should be interpreted against that party. *Graue v. Missouri Property Insurance Placement Facility*, 847 S.W.2d 779, 785 (Mo.banc 1993). (If the contract is fairly open to two or more interpretations, construction will be adopted that is against the party preparing the contract.) If that principle of interpretation is applied, it is a simple matter to understand that plaintiff, at best, is entitled to recover attorney's fees on an hourly basis for work done to protect collateral or its position as the holder of the bond agreement, but that plaintiff is entitled to a percentage fee in actions to enforce the contract.

Whether or not the contract is found to be ambiguous, the entire attorney fee provision makes it obvious that the percentage fee does not apply only to the enforcement of a judgment. The last sentence of Section 2 of the Indemnify Agreement states:

“If upon failure of the parties to comply with any of the terms and conditions of this agreement and should it be necessary for the company to refer this agreement to an attorney for collection, the parties agree to pay an attorney fee in the amount of 33.5% whether or not such action proceeds to judgment.”

(Emphasis supplied.) (Ex. 1.)

Although, as this defendant has previously argued, there is nothing in the sentence to indicate to what the 33.5% applies, it is clear that the provision makes

no reference to merely collecting a judgment and in fact plainly indicates that the percentage fee would apply even before judgment was entered. Plaintiff's interpretation is counterproductive for a bondsman because if the contract is referred to an attorney for collection and the attorney only spends a few hours working on the matter before the full amount demanded is paid, the bondsman would be entitled to only recover the hourly fee but not the percentage amount, even if the bondsman had agreed to pay a percentage to the attorney. Consequently, the overriding purpose of making the bondsman whole would be defeated.

Aside from the interpretation of the contract, plaintiff has failed to produce any evidence to establish that plaintiff had a contractual obligation with her attorneys to pay an hourly rate instead of a percentage fee for work in procuring a judgment against Ms. Pracna. Plaintiff's counsel has submitted time records indicating the amount of time spent on the prosecution of this action, but has provided no evidence that those fees are in fact due, were ever demanded, or have been paid.

The difficulty that plaintiff is having in making the argument for recovery of attorney's fees on top of attorney's fees simply points out the glaring deficiency of the contract. The attorney's fee provision of the contract is ambiguous and is either unenforceable or should be construed against the position of plaintiff and in favor of defendant Pracna to reduce the attorney's fees as submitted in defendant Pracna's opening brief.

REPLY

POINT I.

THE TRIAL COURT ERRED IN PREVENTING MS. PRACNA FROM ARGUING THAT SHE DID NOT OWE THE \$25,000.00 BOND PREMIUM BECAUSE IT IMPROPERLY DIRECTED THE JURY TO FIND THAT ISSUE IN FAVOR OF THE PLAINTIFF IN THAT THE ESTABLISHED FACTS ADOPTED BY THE TRIAL COURT AND THE DECISION OF THE COURT OF APPEALS IN THE PRIOR APPEAL LEFT OPEN THE QUESTION OF WHETHER PLAINTIFF AGREED TO MODIFY THE TERMS OF THE BOND CONTRACT AND TO LOOK SOLELY TO MR. HEARTFELT FOR THAT BOND PREMIUM.

Fritts v. Cloud Oak Flooring Company, 478 S.W.2d 8 (Mo.App. 1972)

DeMean v. Ledl, 796 S.W.2d 415, 419 (Mo.App. S.D. 1990)

REPLY

POINT II.

THE TRIAL COURT ERRED IN REFUSING THE WITHDRAWAL INSTRUCTION RELATING TO BOUNTY HUNTER FEES (AS OPPOSED TO EXPENSES) BECAUSE THERE WAS NO EVIDENCE THAT PLAINTIFF WAS OBLIGATED FOR THE FEES OF THOSE BOUNTY HUNTERS IN THAT PLAINTIFF DENIED ANY OBLIGATION FOR THE FEES, HAD NO OBLIGATION FOR THE FEES AND NEITHER INCURRED NOR PAID THE FEES.

Section 516.120 RSMo. 2000

Civil Rule 55.08

REPLY

POINT III.

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN MS. PRACNA'S MOTION FOR JNOV BECAUSE PLAINTIFF FAILED TO PRESENT SUBSTANTIAL EVIDENCE IN SUPPORT OF HER CASE IN THAT HER OWN TESTIMONY ESTABLISHED THAT SHE DID NOT RELY ON THE ALLEGED REPRESENTATIONS OF MS. PRACNA AND THAT SHE HAD NO DAMAGES TO SUPPORT HER FRAUD CLAIM.

Board of Education of the City of St. Louis v. Elam, 70 S.W. 3rd 448, 452
(Mo.App. E.D. 2000)

Nooney Krombach Co. v Blue Cross & Blue Shield of Missouri, 929 S.W. 2d 888,
895 (Mo. App. E. D. 1996)

REPLY

POINT IV.

THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION NO. 13 BECAUSE NONE OF THE REPRESENTATIONS OF MS. PRACNA ABOUT ALIASES OF MR. HEARTFELT WERE RELIED UPON OR MATERIAL TO THE PLAINTIFF IN THAT PLAINTIFF REPRESENTS HERSELF AS A PROFESSIONAL IN HER FIELD, THE INFORMATION PROVIDED BY MS. PRACNA ON THE BOND APPLICATION CONCERNING AN ALIAS OR NICKNAME WAS TRUE AND THE PLAINTIFF BELIEVED THAT MR. HEARTFELT WOULD RUN WHEN SHE WROTE THE BONDS.

Keefhaver v. Kimbrell, 58 S.W. 3d 54, 60 (Mo.App. W.D. 2001)

REPLY

POINT V.

THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION NO. 15 BECAUSE THERE WERE NO FACTS TO SUPPORT THE ELEMENTS OF DAMAGES AND RELIANCE UNDER THE INSTRUCTION, IN THAT (A) INSTRUCTIONS NO. 9 AND NO. 18 PRECLUDED THE JURY FROM AWARDING ANY DAMAGES IN THE FRAUD CLAIM WHICH WERE RECOVERABLE FOR BREACH OF THE BOND CONTRACT, INCLUDING BOUNTY HUNTER FEES, AND (B) PLAINTIFF COULD NOT HAVE RELIED ON ANY REPRESENTATIONS OF DEFENDANT PRACNA REGARDING THE PAYMENT OF BOUNTY HUNTER FEES WHEN SHE HIRED BOUNTY HUNTERS BECAUSE DEFENDANT PRACNA WAS ALREADY BOUND TO PAY THOSE FEES UNDER THE BOND CONTRACT.

Stotler v. Bollinger, 501 S.W.2d 558, 560 (Mo. App. 1973)

Kincaid Enterprises, Inc. v. Porter, 812 S.W.2d 892 (Mo. App. W.D. 1991)

Anglin Engineering Co. v. J.E. Barry Co., Inc., 912 S.W.2d 633 (Mo. App. E.D. 1995)

Civil Rule 70.03

REPLY ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN PREVENTING MS. PRACNA FROM ARGUING THAT SHE DID NOT OWE THE \$25,000.00 BOND PREMIUM BECAUSE IT IMPROPERLY DIRECTED THE JURY TO FIND THAT ISSUE IN FAVOR OF THE PLAINTIFF IN THAT THE ESTABLISHED FACTS ADOPTED BY THE TRIAL COURT AND THE DECISION OF THE COURT OF APPEALS IN THE PRIOR APPEAL LEFT OPEN THE QUESTION OF WHETHER PLAINTIFF AGREED TO MODIFY THE TERMS OF THE BOND CONTRACT AND TO LOOK SOLELY TO MR. HEARTFELT FOR THAT BOND PREMIUM.

In her brief, plaintiff's analysis seems to be that defendant Pracna must owe the entire \$32,500.00 because she entered into a bond contract jointly with Mr. Heartfelt, the premium for the bonds issued for Mr. Heartfelt were \$32,500.00 and the bond contract was breached. Plaintiff's argument glosses over the pivotal issue on this point—would the evidence permit the jury to find that Ms. Trimble did in fact agree to look solely to Mr. Heartfelt for payment of the \$25,000.00 bond premium? As this defendant points out in Point I of her brief, there were ample facts from which the jury could conclude that Ms. Trimble did in fact make such an agreement.

Plaintiff makes no attempt to recite to this Court any established facts from the trial court or language in the decision issued by the court of appeals in Trimble

I that precludes a finding by the jury that Ms. Trimble agreed to modify the terms of the contract, **after it was signed**. Plaintiff cites no authority which would suggest that parties to a written agreement cannot alter the terms of their agreement by oral modifications after the agreement is executed, nor could she. *See Fritts v. Cloud Oak Flooring Co.*, 478 S.W.2d 8 (Mo.App. 1972) (even by express provision in a contract, the parties cannot deprive themselves of the power to alter, vary or discharge an agreement); and *DeMean v. Ledl*, 796 S.W.2d 415, 419 (Mo.App. S.D. 1990).

The question of whether Ms. Trimble had agreed to modify the terms of the bail bond contract to recover the \$25,000.00 bond premium only from Mr. Heartfelt was critical to the very issue which the court in Trimble I instructed the trial court to determine upon retrial - damages. By depriving the jury of the ability to decide that issue, the trial court committed prejudicial error which can only be corrected by a retrial of plaintiff's breach of contract claim.

REPLY ARGUMENT

POINT II.

THE TRIAL COURT ERRED IN REFUSING THE WITHDRAWAL INSTRUCTION RELATING TO BOUNTY HUNTER FEES (AS OPPOSED TO EXPENSES) BECAUSE THERE WAS NO EVIDENCE THAT PLAINTIFF WAS OBLIGATED FOR THE FEES OF THOSE BOUNTY HUNTERS IN THAT PLAINTIFF DENIED ANY OBLIGATION FOR THE FEES, HAD NO OBLIGATION FOR THE FEES AND NEITHER INCURRED NOR PAID THE FEES.

Plaintiff's response to defendant Pracna's argument on this point is confused by plaintiff's reference to bounty hunter expenses. Appellant's proposed Withdrawal Instruction (Instruction No. B – *See* Appendix to Appellant's Initial Brief at p. 16) did not attempt to withdraw any consideration of bounty hunter expenses from the deliberation of the jury. Instead, it focused upon withdrawal of bounty hunter fees, the same fees which plaintiff denied having any obligation to pay and, in fact, has not paid.

Plaintiff does not deny the testimony she gave at trial to the effect that the bounty hunter fees claimed with respect to Tony Delaughter, U.S. Recovery, Catch & Retrieve, Tod Warf and Dallas Montgomery were never paid by plaintiff because those bounty hunters never captured Mr. Heartfelt. (T.R. 567, 571-572). Plaintiff attempts to skirt this issue by pointing to testimony which suggests that defendant Pracna directly agreed with the bounty hunters to pay their fees. In

effect, the plaintiff is attempting to recover for an obligation that defendant Pracna allegedly had to certain bounty hunters, but not to the plaintiff. Nothing in the bail bond contract suggests that defendant Pracna is obligated to pay plaintiff for obligations which defendant Pracna may have incurred with third parties in connection with the capture of Mr. Heartfelt. Instead, the bail bond contract obligated defendant Pracna to pay bounty hunter fees actually paid or incurred by plaintiff. Nothing in plaintiff's reply on this point suggests that Ms. Pracna ever incurred such an obligation.

As defendant Pracna points out in her brief, at the time of the trial of this case, any claim by bounty hunters referenced in Withdrawal Instruction No. B was barred by the statute of limitations and, therefore, was no longer an obligation of the plaintiff, or for that matter of defendant Pracna. Plaintiff claims that defendant Pracna had to assert the statute of limitations (Section 516.120 RSMo. 2000) as an affirmative defense to plaintiff's claim. Plaintiff's argument fails to recognize, however, that defendant Pracna could not and is not now suggesting that plaintiff's claim for breach of contract was barred by the statute of limitations. To the contrary, defendant Pracna is pointing out that the statute of limitations barred the claims of the bounty hunters, none of whom had any claim in this action or were parties named in the action. Civil Rule 55.08 does not require defendant Pracna to assert the statute of limitations as an affirmative defense to the claims of non-parties in this proceeding. The question is whether plaintiff had, at the time of trial, any obligation to pay fees to any of the bounty hunter fees listed in

Withdrawal Instruction No. B. She did not.

In her response, plaintiff claims that she is being penalized because the extreme duration of this case has allowed the statute of limitations to run on the bounty hunter claims. It is hard to imagine how plaintiff is penalized by refusing to allow her to recover damages which she has never incurred and is not obligated to pay. The bounty hunters had the right and obligation to avoid the bar of the statute of limitations either by bring suit or getting a timely waiver from plaintiff. In any event, there can be nothing unfair about preventing plaintiff from recovery of a windfall in the form of damages she has not proven.

The jury should have had a proper instruction from the court with regard to matters actually in controversy to be decided by the jury. By refusing Withdrawal Instruction No. B, the trial court neglected its duty to narrow the focus of the jury to actual issues, ultimately allowing the jury to assess damages which the plaintiff had no right to recover. A retrial of plaintiff's claim for breach of contract is, therefore, required.

REPLY ARGUMENT

POINT III.

THE TRIAL COURT ERRED IN FAILING TO SUSTAIN MS. PRACNA'S MOTION FOR JNOV BECAUSE PLAINTIFF FAILED TO PRESENT SUBSTANTIAL EVIDENCE IN SUPPORT OF HER CASE IN THAT HER OWN TESTIMONY ESTABLISHED THAT SHE DID NOT RELY ON THE ALLEGED REPRESENTATIONS OF MS. PRACNA AND THAT SHE HAD NO DAMAGES TO SUPPORT HER FRAUD CLAIM.

From the outset, plaintiff confuses the role of this Court in determining whether Ms. Pracna's Motion for JNOV should have been sustained. Plaintiff correctly states that the issue of whether a plaintiff relied upon a representation is a matter of fact to be determined by the jury. That does not, however, avoid the firmly established doctrine in this state that the determination of whether plaintiff established a submissible case is a matter of law to be determined by the court. *See Board of Education v. Elam*, 70 S.W.3d 448, 452 (Mo.App. E.D. 2000) (question of whether evidence is substantial and whether the inferences drawn are reasonable is question of law).

Only by ignoring the direct testimony of the plaintiff can one conclude that she relied upon the alleged representations of Ms. Pracna in reaching her decision to write the bond or in hiring bounty hunters. As mentioned in defendant's opening brief, plaintiff expressly stated in her testimony that, after being told of Mr. Heartfelt's criminal background, after being told of aliases he had used and

after supposedly accepting at face value alleged contradictory statements of Ms. Pracna, she nonetheless wrote the bonds while believing that Mr. Heartfelt would run on the bonds. To suggest that plaintiff was interested in any issue other than the sufficiency of the surety for the bond stretches credulity. By her own testimony, plaintiff acknowledged that she was interested in nothing else (T.R. 554-556). There is no evidence which suggests that plaintiff found her secured position was anything other than adequate. Plaintiff's proof of the essential elements of materiality and reliance are undone by her own testimony. If the alleged misrepresentations were admittedly unimportant to the plaintiff, what does it matter that the representations might have been important to someone else?

Likewise, with respect to the bounty hunters, plaintiff does not suggest in her response to defendant's opening brief that defendant's alleged representations caused the plaintiff to hire bounty hunters. In fact, plaintiff's response clearly states that plaintiff believed the representations of defendant Pracna caused Ms. Pracna to owe money to the bounty hunters, not that those representations caused plaintiff to incur the obligations. (*See* Plaintiff's Substitute Initial Brief, at page 68). That defendant Pracna had an obligation to the bounty hunters could not support plaintiff's claim. By plaintiff's own admission, she did not owe the bounty hunters any compensation because their compensation was contingent upon the capture of Mr. Heartfelt. Given those arrangements, it is not surprising that defendant Pracna encouraged plaintiff to hire bounty hunters because the cost to both plaintiff and defendant Pracna would be the same either way.

Finally, plaintiff argues that she has proven damages on her fraud claim because she proved damages in support of her contract claim. This is a strange argument indeed. Plaintiff does not complain about the instruction from the trial court to the jury which precluded the jury from assessing contractual damages as damages for the fraud claim. Plaintiff acknowledges in her response that the only damage that she could claim was her alleged “lost” time in searching for Mr. Heartfelt. The fact that plaintiff “lost” time in searching for Mr. Heartfelt is relevant only if it caused plaintiff some damage. Plaintiff offers no explanation as to how plaintiff’s “lost” time translates into damages. By her own testimony, plaintiff acknowledged that her time was only compensated in the form of profits from the business. Since there have never been profits, there could be no damage.

Plaintiff cites no authority for the proposition that “lost time” is a recoverable element of damages. Instead, she now contends that her claim for “lost time” was recoverable under a theory of quantum merit. Aside from the fact that she pleaded no claim in quantum meruit, that theory of recovery is barred by the fact that plaintiff submitted and recovered on her claim for breach of the bond contract. *See Nooney Krombach Co. v Blue Cross & Blue Shield of Missouri*, 929 S.W. 2d 888, 895 (Mo. App. E. D. 1996) (where party recovers for services under express contract no recovery is permitted under quantum meruit). In this case, plaintiff recovered for the services of issuing the bail bond in the form of a bond premium and for specific expenses recoverable under the contract. Therefore, the service plaintiff rendered while looking for Mr. Heartfelt or attempting to liquidate

collateral is not recoverable under quantum meruit (Ex. 214). Plaintiff spent whatever time she devoted to those efforts voluntarily and without any promise of compensation, express or implied. She did so to protect herself and her company, which is a normal and essential part of running any business. But it is not an element of damages in any case, especially where the plaintiff drew the contract, elected to omit it and can prove no loss as a result.

REPLY ARGUMENT

POINT IV.

THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION NO. 13 BECAUSE NONE OF THE REPRESENTATIONS OF MS. PRACNA ABOUT ALIASES OF MR. HEARTFELT WERE RELIED UPON OR MATERIAL TO THE PLAINTIFF IN THAT PLAINTIFF REPRESENTS HERSELF AS A PROFESSIONAL IN HER FIELD, THE INFORMATION PROVIDED BY MS. PRACNA ON THE BOND APPLICATION CONCERNING AN ALIAS OR NICKNAME WAS TRUE AND THE PLAINTIFF BELIEVED THAT MR. HEARTFELT WOULD RUN WHEN SHE WROTE THE BONDS.

In her response brief, plaintiff tacitly admits that she possessed a great deal of knowledge about the aliases of Mr. Heartfelt before she wrote the bond. In particular, she acknowledges that she had been told by Dianna Long, the prosecuting attorney, that Mr. Heartfelt had a long list of aliases. Plaintiff candidly admits that she believed that Mr. Heartfelt would run on the bonds before the bonds were written. Nonetheless, plaintiff claims that she was misled by the manner in which Ms. Pracna completed the bond application form.

The fact is that the response given by Ms. Pracna to the question about whether Mr. Heartfelt had an alias or nickname was exactly correct. The bond application form, which was prepared by the plaintiff and not by Ms. Pracna, did not solicit each and every alias or nickname by which the accused was known.

Instead, it simply asked if Mr. Heartfelt had an alias or nickname and Ms. Pracna specifically indicated that his nickname was “Chance.” (Ex. 1). Obviously, plaintiff claims that Instruction No. 13 should have been submitted because of the statement by Ms. Pracna denying that Mr. Heartfelt used the aliases as alleged by the prosecuting attorney.

The law in the State of Missouri simply does not place Ms. Trimble, who holds herself to be a professional in her field, on the same level as someone who is uninitiated about the bail bond business. The case of *Keefhaver v. Kimbrell*, 58 S.W. 3d 54, 60 (Mo.App. W.D. 2001) certainly suggests that a professional or one who holds himself out as an expert is held to a higher standard and has less of a right to rely upon statements than an untrained person or a mere layman. It was apparently the expertise of Ms. Trimble which led her to conclude that if she wrote the bonds, Mr. Heartfelt would run. (T.R. 657-658). Ms. Trimble made it clear that she wrote the bond notwithstanding that belief, simply because she had ample collateral to protect herself.

Certainly the current trend of the law suggests that there is a low threshold of proof necessary to show reliance upon a representation, but there still must be some proof of reliance – especially where the plaintiff knew the risk and knowingly accepted the risk before entering into the agreement.

REPLY ARGUMENT

POINT V.

THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTION NO. 15 BECAUSE THERE WERE NO FACTS TO SUPPORT THE ELEMENTS OF DAMAGES IN RELIANCE UNDER THE INSTRUCTION, IN THAT (A) INSTRUCTIONS NO. 9 AND NO. 18 PRECLUDED THE JURY FROM AWARDING ANY DAMAGES IN THE FRAUD CLAIM WHICH WERE RECOVERABLE FOR BREACH OF THE BOND CONTRACT, INCLUDING BOUNTY HUNTER FEES, AND (B) PLAINTIFF COULD NOT HAVE RELIED ON ANY REPRESENTATIONS OF DEFENDANT PRACNA REGARDING THE PAYMENT OF BOUNTY HUNTER FEES WHEN SHE HIRED BOUNTY HUNTERS BECAUSE DEFENDANT PRACNA WAS ALREADY BOUND TO PAY THOSE FEES UNDER THE BOND CONTRACT.

Plaintiff Trimble does not dispute the fact that bounty hunter fees were recoverable, and in fact were recovered, under the claim for breach of the bond contract. Plaintiff also fails to explain how she could have relied upon any representation of defendant Pracna about hiring of bounty hunters when the bond contract already required defendant Pracna to pay any bounty hunter fees. Plaintiff's silence on those points is understandable because Instruction No. 15 was not supported by any evidence of reliance separate and apart from the bond

contract with respect to the hiring of bounty hunters, nor was it supported by any evidence of damages separate and apart from those encompassed by Instructions No. 9 and No. 18.

A. DAMAGES

Instead of addressing the issues raised by this defendant, plaintiff launches into a discussion about election of remedies. The fact is that, by agreeing to Instruction No. 18, the plaintiff necessarily agreed that no damages recoverable on her claim under the bond contract could have been recoverable under her fraud claim. Instruction No. 9 specifically told the jury that it must award such sum as would fairly and justly compensate the plaintiff for any damages they believed plaintiff sustained as a result of the breach of the bond contract. (AA-008). Instruction No. 18 specifically told the jury that they were not to assess any damages on the fraud claim which had been assessed on the breach of contract claim. (AA-015).

The procedure implemented by the trial court was an apparent attempt to avoid the duplication of damages which led to finding of plain error in *Kincaid Enterprises, Inc. v. Porter*, 812 S.W.2d 892, 900-901 (Mo. App. W.D. 1991). In *Kincaid*, the plaintiff had submitted separate verdict directors and received separate verdicts both on plaintiff's claim for breach of contract and on plaintiff's claim for fraudulent misrepresentation. The court found that to allow plaintiff to recover on both verdicts would be error in that it would permit double recovery:

Kincaid was entitled to be made whole by one compensatory damage

award, but not to the windfall of a double recovery. A double recovery is a species of unjust enrichment and is governed by the same principles of preventative justice. Thus, instructions that allow a jury to return damages that overlap or duplicate are error. Id. pp. 900-901.

Consequently, this is not an election of remedies issue. It is a straight forward issue of whether each element of Instruction No. 15 was supported by the evidence in the case, as it must be. *Stotler v. Bollinger*, 501 S.W.2d 558, 560 (Mo. App. 1973); *Johnson v. Bush*, 418 S.W.2d 601, 604 (Mo. App. 1967). There was no such evidence, so the instruction should not have been given.

There can be no argument that defendant Pracna failed to timely object to Instruction No. 15 on the specific grounds that it was not supported by evidence of damages separate and apart from plaintiff's contract claim (T.R. 1574-75). Defendant Pracna made that objection during the instruction conference as she is required to do. Civil Rule 70.03.

Defendant Pracna will not repeat the argument set out in her substitute opening brief about the fact that bounty hunter fees were recoverable under plaintiff's claim on the bond contract, and in fact were part of the damages plaintiff requested and recovered on that contract. The trial court had the duty to assume the jury would follow its instructions and that therefore it would award any bounty hunter fees due to plaintiff on plaintiff's contract claim but not plaintiff's fraud claim. That left no damages that could be recovered by plaintiff

on her fraud claim with respect to the hiring of bounty hunters. It was error for the trial court to read Instruction No. 15 to the jury under those circumstances.

B. RELIANCE

The gravamen of Instruction No. 15 was that plaintiff incurred bounty hunter fees because of defendant Pracna's representations that she would pay for bounty hunters if they were hired. The instruction ignores the fact that, at the time of the discussion about hiring bounty hunters, defendant Pracna had already executed the bond contract which required her to pay all recapture costs, including bounty hunter fees (Ex. 1).

The facts of this case are strikingly similar to those in *Anglin Engineering Co. v. J.E. Barry Co., Inc.*, 912 S.W.2d 633 (Mo. App. E.D. 1995). In that case, Anglin was a subcontractor of Barry on a construction project. Anglin sued Barry for failing to pay invoices for services provided by Anglin under its contract. Anglin also brought a claim for fraud alleging that Barry had given Anglin assurances of payment which caused Anglin to provide services to Barry. The court found that promises made by Barry to pay Anglin for performance under its contract did not constitute a basis for fraud:

Barry's promise to pay for the drawing six months after Anglin began work pursuant to the contract was superfluous, because Barry was obligated to pay under the terms of the contract. Barry's failure to perform under the contract by refusing to pay Anglin for the drawings, after it assured Anglin it would pay, constituted merely

breach of contract and did not rise to the level of fraud. *Id.* p. 639.

Likewise, any representation by defendant Pracna concerning payment of bounty hunter fees after the bond contract was formed was merely redundant to the written agreement she had already made to pay those fees and expenses. Plaintiff could not and did not rely upon any statements by defendant Pracna in deciding to hire bounty hunters. She instead relied upon defendant Pracna's promises under the bond contract and upon the collateral that defendant Pracna had provided to plaintiff to secure her promise.

C. CONCLUSION

Every element of a verdict directing instruction must be supported by the evidence presented to the jury. Instruction No. 15 lacked any such support both with respect to the elements of reliance and damages and, therefore, it was error for the trial court to submit that instruction. The submission of that instruction seriously misled the jury and should not have been submitted.

CONCLUSION

Because of the substantial and cumulative effect of the errors of the trial court, there is no just remedy other than to direct that the trial court retry this case. That retrial should include all issues and claims submitted by the parties in this case.

Respectfully submitted,

HUSCH & EPPENBERGER, LLC

By: _____
CHARLES B. COWHERD, MBE#27087
1949 East Sunshine, Suite 2-300
Springfield, MO 65804-1605
Office: (417) 862-6726
Fax No.: (417) 862-6948
Fax No.: (312) 606-7777

Attorneys For Appellant/Cross-Respondent
Timmi Ann Pracna

IN THE SUPREME COURT OF MISSOURI

KAREN F. TRIMBLE)	
	Respondent/)
	Cross-Appellant,)
vs.)	Appeal No. SC86269
)	
TIMMI ANN PRACNA,)	
	Appellant/)
	Cross-Respondent.)

**CERTIFICATE OF COMPLIANCE WITH RULE 84.06 AND
CERTIFICATE OF SERVICE**

STATE OF MISSOURI)
) ss.
COUNTY OF GREENE)

Pursuant to Rule 84.06(c), counsel for Appellant certifies that this brief complies with the limitations contained therein. There are 8,525 words in this brief. Counsel for Appellant relied on the word count of his word processing system in making this certification.

Pursuant to said Rules, counsel for Appellant certifies that the disk filed herewith has been scanned for viruses and is virus-free.

Further, counsel for Appellant states that Appellant's opening brief in the within cause was by him caused to be served, either by Federal Express or by ordinary mail, postage prepaid, in the following stated number of copies, addressed to the following named persons at the addresses shown, all on the ____day of November, 2004:

10 copies and 1 diskette: Thomas F. Simon, Clerk
Missouri Court of Appeals
Southern District
300 John Q. Hammons Parkway
Springfield, MO 65806

2 copies and 1 diskette: Mr. Lynn Myers
2045 South Glenstone, Suite 201
Springfield, MO 65804
Fax No.: 877-7948

HUSCH & EPPENBERGER, LLC

By: _____
CHARLES B. COWHERD, MBE#27087
1949 East Sunshine, Suite 2-300
Springfield, MO 65804-1605
Office: (417) 862-6726
Fax No.: (417) 862-6948
Fax No.: (312) 606-7777

Attorneys For Appellant/Cross-Respondent
Timmi Ann Pracna

Subscribed and sworn to before me this _____ day of November, 2004.

Notary Public

My commission expires: